ORIGINAL

No. 94-1969

Supreme Court, U.S.
FILED
JUN 30 1995
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

STATE OF NEBRASKA,

Petitioner,

v.

JOHN E. RUST,

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

EMIL M. FABIAN, Counsel of Record

&

BARBARA THIELEN

of

Fabian & Thielen
1939 S. 24th St., PO Box 7567
Omaha, NE 68107
(402) 733-7755

Attorneys for Respondent

RECEIVED
JUL - 3 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Nebraska Supreme Court erred in finding that the life sentence imposed at Rust's capital resentencing hearing served to acquit him of the harsher sentence of death.

2. Whether the Nebraska Supreme Court erred in finding that this Court's holdings in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), and Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), make the protections of the double jeopardy clause applicable to the capital resentencing procedure involved herein, thereby preventing the State of Nebraska from challenging, as "excessively lenient", the life sentence imposed in this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
I. THE DOUBLE JEOPARDY CLAUSE BARS ANY RECONSIDERATION OF A LIFE SENTENCE IMPOSED AFTER A CAPITAL SENTENCING TRIAL	6
CONCLUSION	17

TABLE OF AUTHORITIES

TABLE OF CASES

Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) 5, 8, 14

Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) 5, 6, 7, 8, 10, 13, 14

Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) 5, 11, 12, 13, 14, 15

Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993), cert. denied, ___ U.S. ___, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993) 4

State v. Joubert, 224 Neb. 411, 399 N.W.2d 237 (1986) 1

State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982) 1

State v. Rumsey, 136 Ariz. 166, 665 P.2d 48 (1983) 9

State v. Rust, 247 Neb. 503 (1995) 5

State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977) 1

STATUTES CITED

Neb.Rev.Stat. §28-303 (Reissue 1989) 1

Neb.Rev.Stat. §29-2320 et. seq. (Cum. Supp. 1992) 4

Neb.Rev.Stat. §29-2519 et. seq. (Reissue 1989) 1

Neb.Rev.Stat. §29-2520 (Reissue 1989) 1

Neb.Rev.Stat. §29-2521 (Reissue 1989) 1

Neb.Rev.Stat. §29-2522 (Reissue 1989) 1, 3

Neb.Rev.Stat. §29-2523(1) (Reissue 1989) 1

STATEMENT OF THE CASE

A defendant convicted of capital murder in Nebraska can be sentenced either to death or life imprisonment. Neb. Rev. Stat. §28-303 (Reissue 1989). Special statutory procedures must be followed in the determination of sentence. Neb. Rev. Stat. §29-2519 et. seq. (Reissue 1989). The determination may be made by the trial judge alone or by a panel of three judges, including the trial judge. Neb. Rev. Stat. §29-2520 (Reissue 1989).

A separate proceeding is held wherein evidence is presented regarding any of the statutorily defined aggravating and mitigating circumstances. The state and the defendant are permitted to present argument for or against a sentence of death. Neb. Rev. Stat. §29-2521 (Reissue 1989).

The prosecution is limited to proof of the statutorily defined aggravating circumstances Neb. Rev. Stat. §29-2523(1) (Reissue 1989), and the existence of any such circumstance(s) must be proven beyond a reasonable doubt. State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977). The defendant may offer any evidence in mitigation and is not limited to the statutory mitigating circumstances. State v. Joubert, 224 Neb. 411, 399 N.W.2d 237 (1986). State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).

Neb. Rev. Stat. §29-2522 (Reissue 1989) provides that:

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life

> imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

The sentencing panel in Rust's case considered the evidence in light of the statutory aggravating and mitigating circumstances, and also considered the non-statutory mitigating circumstances proffered by the defendant. (Appendix to Petition p. 30).

The panel unanimously found that aggravating circumstance (1)(h) ("the crime was committed to disrupt or hinder . . . the enforcement of the laws"), and the first prong of aggravating circumstance (1)(a) ("the offender was previously convicted of . . . a crime involving the use or threat of violence to the person ...") were applicable in this case beyond a reasonable doubt. (Appendix to Petition pp. 32, 38, 46). The panel also found that mitigating circumstance (2)(c) ("the crime was committed while the offender was under the influence of extreme mental or emotional disturbance") was applicable in this case. (Appendix to Petition p. 40). The Court determined that the non-statutory mitigating factors were entitled to "little, if any, weight." (Appendix to Petition p. 45)

Following the above procedure as mandated by Neb. Rev. Stat. §29-2522 (Reissue 1989), the sentencing panel determined that the two aggravating circumstances existing in this case were "not sufficient to justify the imposition of a death sentence." (Appendix to Petition p. 47).

The panel stated, in addition, that "the weight we accord to mitigating circumstance (2)(c) approaches the weight we give to the existing aggravating circumstances. On that basis, we conclude that a sentence of death would not be appropriate in this case." (Appendix to Petition p. 47).

Claiming that the sentencing panel erred in its consideration of various aggravating circumstances, the state appealed to the Nebraska Supreme Court urging remand for "further evaluation of an appropriate sentence for Rust." The Court rejected the

state's attempt to appeal this case pursuant to Neb. Rev. Stat. §29-2320 et. seq. (Cum. Supp. 1992), which authorizes the prosecution to appeal a sentence believed to be "excessively lenient."

The Nebraska Supreme Court held:

> It is the life sentence imposed at the resentencing hearing which served to acquit Rust of the harsher death sentence. Accordingly, the holdings of the U.S. Supreme Court in **Bullington, Poland** and **Rumsey** make the protections of the Double Jeopardy Clause applicable to the capital resentencing procedure involved and prevent the State from challenging as excessively lenient the life sentence imposed in this case.

(Appendix to Petition p. 16).

SUMMARY OF THE ARGUMENT

On October 30, 1975, Respondent Rust was sentenced to death in connection with his conviction for the offense of felony murder. The granting of federal habeas corpus relief was affirmed by the Eighth Circuit Court of Appeals. Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993), cert. denied, ___ U.S. ___, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993). Following a capital resentencing hearing, wherein the sentencing panel found two aggravating circumstances and one mitigating circumstance, the evidence was deemed insufficient to justify the death penalty. Rust received a life sentence. The State of Nebraska appealed, arguing that the life sentence was

"excessively lenient" and urging the Nebraska Supreme Court to remand the matter to the trial court for "further evaluation of an appropriate sentence for Rust."

The Nebraska Supreme Court found that the life sentence imposed at the resentencing hearing served to acquit Rust of the harsher death sentence. The Court held that this Court's holdings in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), and Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) made the protections of the Double Jeopardy Clause applicable to Rust's capital resentencing and prevented the state from challenging the life sentence as "excessively lenient." State v. Rust, 247 Neb. 503 (1995).

In its petition for certiorari filed herein, the state argues that the Nebraska Supreme Court's resolution of this question is contrary to rules of law and the analysis contained in prior rulings of this Court. The Petitioner alleges that the state's only burden at a capital sentencing is to prove facts sufficient to establish the existence of aggravating circumstances. Petitioner misstates the law, totally ignoring that its ultimate burden is one of persuading the sentencer that death is the appropriate penalty.

The Petitioner's attempt to distinguish the facts of this case from those in Poland is illusory, and the argument completely disregards the principles previously enunciated by this Court on the issue involved herein. This case is squarely controlled by Bullington, Rumsey and Poland. The petition for writ of

certiorari filed herein is wholly frivolous and contains no novel question meriting this Court's consideration.

ARGUMENT

I.

THE DOUBLE JEOPARDY CLAUSE BARS ANY RECONSIDERATION OF A LIFE SENTENCE IMPOSED AFTER A CAPITAL SENTENCING TRIAL.

In Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), this Court held that because the sentencing proceeding at the petitioner's first trial was like a trial on the issue of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury was also available, with respect to the death penalty, upon retrial. Id. at 447, 101 S.Ct. at 1862.

This Court noted that Missouri law provided only two possible sentences for a defendant convicted of capital murder: death or life imprisonment. The Missouri statutes contained substantive standards to guide the discretion of the sentencers and afforded procedural safeguards to a convicted defendant. A separate proceeding was required to be held before the jury that had found the defendant guilty, wherein evidence of statutory aggravating and mitigating circumstances was to be heard. The jury was to consider whether any of the statutory aggravating or mitigating circumstances were present; whether any aggravating circumstances that did exist were sufficient to warrant the death penalty; and whether any mitigating circumstances that did exist

outweighed the aggravating circumstances. A jury that imposed a sentence of death was required to designate in writing the aggravating circumstance or circumstances that it found beyond a reasonable doubt. The Missouri statutory scheme also required that the jury be convinced beyond a reasonable doubt that any aggravating circumstance or circumstances that it found to exist were sufficient to warrant the imposition of the death penalty. Id. at 435, 101 S.Ct. at 1855-1856.

This Court noted that the jury was not given unbounded discretion, but was presented with a choice between two alternatives, and standards to guide the making of that choice. Further, the prosecution did not simply recommend a sentence, "it undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts." Id. at 439, 101 S.Ct. at 1858. The sentencing proceeding was, therefore, "itself a trial on the issue of punishment so precisely defined by the Missouri statutes." Id. at 439, 101 S.Ct. at 1858.

This Court stated that:

> By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, . . . Missouri explicitly requires the jury to determine whether the prosecution has "proved its case." . . . Chief Justice Bardgett, in his dissent from the ruling of the Missouri Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that

> "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence." (Citation omitted) We agree.
>
> A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle . . . are equally applicable when a jury has rejected the State's claim that the defendant deserves to die.

Id. at 445-446, 101 S.Ct. 1861.

In Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), this Court held that the Double Jeopardy Clause prohibited the State of Arizona from sentencing respondent to death after his life sentence was set aside on appeal, notwithstanding the fact that the failure to initially impose the death penalty was based on a misconstruction of an aggravating circumstance under the capital sentencing law.

That decision was squarely controlled by the ruling in Bullington v. Missouri, supra. The Court noted that Arizona's capital sentencing procedure shared the trial-like characteristics of the Missouri proceeding which triggered double jeopardy protection.

In Rumsey, supra, the defendant had been convicted of armed robbery and first degree murder. The trial judge alone conducted a separate sentencing hearing in connection with Arizona's capital sentencing scheme, which involved the weighing of aggravating and mitigating circumstances. The state argued

that three aggravating circumstances were present. Defendant countered that no aggravators were present, but that several mitigating factors were. The sentencing judge found that no aggravating or mitigating factors existed, and the defendant was sentenced to life imprisonment. Defendant was also sentenced to a consecutive term of 21 years for the armed robbery.

Defendant appealed the imposition of consecutive sentences and the state cross-appealed, arguing that the trial court had committed an error of law in interpreting one of the aggravating circumstances. The Arizona Supreme Court concluded that the trial court had in fact misinterpreted one of the aggravating factors. Consequently, the sentence of life imprisonment was set aside and the matter remanded for resentencing. Following resentencing procedures in the trial court, defendant was sentenced to death.

On further appeal to the Arizona Supreme Court, defendant argued that the imposition of a sentence of death, after he had effectively been "acquitted" of death at his initial sentencing, violated the Double Jeopardy Clause of the Fifth Amendment as applied to the states by the Fourteenth Amendment. The Arizona Supreme Court agreed, concluding that under Bullington v. Missouri, supra, defendant's sentence of death violated the constitutional prohibition against double jeopardy. State v. Rumsey, 136 Ariz. 166, 665 P.2d 48 (1983). Defendant was once again sentenced to life imprisonment.

This Court agreed with the Arizona Supreme Court that, under the interpretation of the Double Jeopardy Clause adopted

in Bullington v. Missouri, supra, the imposition of the death penalty on Rumsey would be unconstitutional. This Court found that:

> The double jeopardy principle relevant to respondent's case is the same as that invoked in **Bullington**: an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the **Bullington** principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding - whether death was the appropriate punishment for respondent's offense.

Id. at 211-212, 104 S.Ct. at 2310.

This Court further noted that "an acquittal on the merits . . . as such, bars any retrial of the appropriateness of the death penalty." Id. at 212, 104 S.Ct. at 2310.

This Court recognized that an error of law had been made by the trial court in arriving at its original sentence of life imprisonment. However, such error did not dictate a different result.

> In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' . . .

> affects the accuracy of that determination, but it does not alter its essential character." United States v. Scott, 437 U.S. 82, 98, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1978) (quoting id., at 106, 98 S.Ct., at 2201 (BRENNAN, J., dissenting)). Thus, this Court's cases hold that an acquittal on the merits bars retrial even if based on legal error.

Id. at 212, 104 S.Ct. at 2310.

It was also noted that a capital sentencing proceeding is not made any less like a trial because of the availability of appellate review. Such a review, including the reweighing of aggravating and mitigating circumstances, does not "make the appellate process part of a single continuing sentencing proceeding." Id. at 210, 104 S.Ct. at 2309.

In Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), the petitioners robbed a bank, killed two guards, and were convicted of first degree murder.

At a separate hearing, the trial judge found that the "pecuniary gain" statutory aggravating circumstance related only to contract killings and was therefore not applicable. The Court did find the "especially heinous, cruel or depraved" statutory aggravating circumstance to be present and, on that basis, sentenced the petitioners to death. While the Arizona Supreme Court reversed and remanded for a retrial on other grounds, it found that the evidence was insufficient to support the "especially heinous" circumstance. It further found, however, that the trial court erred in limiting the "pecuniary gain" circumstance to contract killings and that, if petitioners

were again convicted, the judge could find this circumstance present.

On remand, the petitioners were again convicted of first degree murder and the trial judge again sentenced them to death, finding the existence of both the "pecuniary gain" and "especially heinous" aggravating circumstances.

The Arizona Supreme Court found the evidence still insufficient to support the "especially heinous" circumstance, but sufficient to support the "pecuniary gain" circumstance. The Court affirmed, rejecting Petitioners' argument that double jeopardy barred reimposition of the death penalty.

This Court granted certiorari to consider the question and held that the trial judge's rejection of the "pecuniary gain" circumstance was not an "acquittal" of that circumstance for double jeopardy purposes and did not foreclose its consideration by the reviewing court. It was further held that because the reviewing court did not find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty "acquittal" by that court and the Double Jeopardy Clause did not, therefore, foreclose a second sentencing hearing at which the "clean slate" rule applied. Id. at 158, 106 S.Ct. at 1756.

This Court noted that:

> Under Bullington and Rumsey, therefore, the relevant inquiry in the cases before us is whether the sentencing judge or the reviewing court has "decid[ed] that the prosecution has not proved its case" for the death penalty and hence has "acquitted" petitioners.

> Bullington, 451 U.S., at 443, 101 S.Ct., at 1860.

Id. at 155, 106 S.Ct. at 1754.

The Court distinguished Poland from Bullington and Rumsey by pointing out that:

> At no point during petitioners' first capital sentencing hearing and appeal did either the sentencing or the reviewing court hold that the prosecution had "failed to prove its case" that the petitioners deserved the death penalty. Plainly, the sentencing judge did not acquit, for he imposed the death penalty.

Id. at 155, 106 S.Ct. at 1754-1755.

This Court observed that:

> Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment. 451 U.S., at 438, 101 S.Ct., at 1858. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not "acquit" a defendant (i.e., preclude the death penalty).
>
> It is true that the sentencer must find some aggravating circumstance before the death penalty may be imposed, and that the sentencer's finding, albeit erroneous, that

> no aggravating circumstance is present is an "acquittal" barring a second death sentence proceeding. Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

Id. at 157, 106 S.Ct. at 1755.

In Poland, this Court pointed out that the concern with protecting the finality of acquittals is not implicated when a defendant is sentenced to death, (i.e., "convicted"). The Court was unwilling to extend Bullington to a point where the capital sentencing hearing becomes "a set of minitrials on the existence of each aggravating circumstance." It stated:

> Bullington indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" that the death penalty is appropriate. (Emphasis in original)

Id. at 156, 106 S.Ct. at 1755.

Clearly, the principles enunciated in Bullington, supra, Rumsey, supra, and Poland, supra, squarely control the disposition of this case. Nebraska's capital sentencing procedure shares the trial-like characteristics of the Missouri and Arizona proceedings, thereby entitling Rust to the constitutional protection of the double jeopardy clause.

Although the sentencing panel found the existence of two aggravating circumstances, they were deemed insufficient to justify imposition of the death penalty. As noted in Poland, supra, the finding of any particular aggravating circumstance

does not require the death penalty. The sentencers in Rust also found the existence of one mitigating circumstance, which approached the weight of the aggravating circumstances. (Appendix to Petition p. 16).

After scrupulously following the statutory procedure, the sentencing panel found that the existing circumstances were not sufficient to justify the imposition of a death sentence.

The sentencers clearly decided that "'. . . the prosecution had not proved its case' that the death penalty is appropriate." (Emphasis in original) Poland v. Arizona, supra, 476 U.S. at 156, 106 S.Ct. at 1755.

The Petitioner's claim, that the Nebraska Supreme Court's resolution of this question is contrary to rules of law and the analysis contained in prior rulings of this Court, is baseless and completely without merit.

The state acknowledges that "the distinction between Poland and Rust's situation is that Poland ultimately received a sentence of death prior to appeal and Rust did not", yet boldly asserts that "our analysis of this Court's cases on this subject leads us to believe that such a distinction, standing alone, is not legally significant and that Rust's case, like Poland's, was capable of remand and resentencing without violation of the Double Jeopardy Clause." (Petition p. 9).

The Petitioner erroneously claims that "The only burden the prosecution assumes at the penalty phase is to offer evidence sufficient to establish beyond a reasonable doubt that one or more statutory aggravating circumstances are present in the

commission of the murder or the history of that defendant." (Petition p. 16). This allegation is a misstatement of law. As is always the case, the state bears both the burden of proving facts to establish the existence of aggravating circumstances beyond a reasonable doubt, and the burden of persuasion on the ultimate issue; that is, convincing the sentencing entity that death is the appropriate penalty.

The sentencing order makes clear that the state failed to carry that ultimate burden in Rust's case. The Petitioner's attempt to acknowledge the state's burden of proving facts to support the existence of aggravating circumstances, while ignoring its ultimate burden of proving the appropriateness of the death penalty, is artifice. Petitioner's entire argument blatantly disregards the clear precedent contained in the prior rulings of this Court.

In the case at bar, Rust has unequivocally been "acquitted" of the death penalty, and the Double Jeopardy Clause constitutionally bars any review or reconsideration of that sentence.

CONCLUSION

The Respondent respectfully submits that the manner in which the issues were addressed below and the results obtained do not present any of the special or important considerations outlined in Supreme Court Rule 10. The petition for certiorari filed by the State of Nebraska is wholly frivolous and does not contain any unsettled issue or other grounds meriting this Court's consideration. Respondent therefore requests that the petition for writ of certiorari be denied.

JOHN E. RUST, Respondent

BY: _____

EMIL M. FABIAN - #16236 - of
Fabian & Thielen
4939 S. 24th St., PO Box 7567
Omaha, NE 68107
(402) 733-7766
Attorneys for Respondent

BY: _____

BARBARA THIELEN - #16673 - of
Fabian & Thielen
4939 S. 24th St., PO Box 7567
Omaha, NE 68107
(402) 733-7766
Attorneys for Respondent